

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEONEL MICHEL VARGAS,

Defendant.

No. CR-13-6025-EFS

**ORDER GRANTING DEFENDANT'S MOTION
TO SUPPRESS**

The first duty of government is the safety of its people—by Constitutional means and methods. Technology, including the means for covert surveillance of individuals through the use of a hidden video camera that wirelessly transmits images to an offsite computer of a law enforcement officer, can be an important tool in investigating crime. Here, in April and May 2013, law enforcement officers obtained permission from a utility company to install, and did install, a disguised video camera on a utility pole more than one hundred yards from Defendant Leonel Michel Vargas' rural eastern Washington home. It continuously recorded activity in the front yard of Mr. Vargas' property for more than six weeks and transmitted those images to a law enforcement officer's computer. This permitted the officer, when viewing live footage, to pan and zoom the camera and, when the officer was off duty, to record the footage for later viewing. Mr. Vargas argues this constant surreptitious video viewing and recording of the activities at the front

1 of his home and yard violated his Fourth Amendment right to be free from
2 unreasonable search. For that reason, he asks the Court to suppress
3 the evidence obtained as a result of this prolonged surreptitious video
4 viewing and recording. The U.S. Attorney's Office (USAO) opposes
5 suppression, contending that the video feed simply permitted law
6 enforcement to remotely observe what any law enforcement officer could
7 have observed if he passed by Mr. Vargas' front yard on the public
8 gravel access road in front of Mr. Vargas' home. After reviewing
9 relevant Fourth Amendment jurisprudence and applying such to the facts
10 here, the Court rules that the Constitution permits law enforcement
11 officers to remotely and continuously view and record an individual's
12 front yard (and the activities and people thereon) through the use of
13 a hidden video camera concealed off of the individual's property *but*
14 *only* upon obtaining a search warrant from a judge based on a showing of
15 probable cause to believe criminal activity was occurring. The American
16 people have a reasonable expectation of privacy in the activities
17 occurring in and around the front yard of their homes particularly where
18 the home is located in a very rural, isolated setting. This reasonable
19 expectation of privacy prohibits the warrantless, continuous, and covert
20 recording of Mr. Vargas' front yard for six weeks. Mr. Vargas' motion
21 to suppress the evidence obtained as a result of the video feed is
22 granted. The Court provides a more detailed articulation of the factual
23 circumstances and its ruling below.

24 **A. Facts**

25 Mr. Vargas' home is located on Arousa Road: a gravel road in the
26 rural farmland area of Franklin County in eastern Washington. Arousa

1 Road borders Mr. Vargas' front yard on the east; continuing eastward
2 beyond Arousa Road is undeveloped land with sagebrush and other native
3 plants. Mr. Vargas' driveway is located on the southern portion of his
4 property, with a gate separating Arousa Road and the driveway. The
5 driveway leads to a mixed gravel and dirt parking area and an open,
6 detached parking structure, which was used to store items and park a
7 car and a four-wheeled all-terrain vehicle (ATV). In addition to the
8 gated driveway, a simple wire cyclone fence and a twenty-foot strip of
9 natural vegetation separates Mr. Vargas' front yard from the gravel
10 Arousa Road. Mr. Vargas' home sits approximately sixty feet west of
11 Arousa Road: immediately to the east of the house is an approximate
12 twenty-foot concrete patio, then approximately ten feet of grass and
13 weeds, followed by twenty-five feet of a mixed dirt and gravel parking
14 area, then twenty feet of undeveloped land with natural vegetation in
15 which the cyclone fence is positioned, and then Arousa Road. The
16 concrete patio was used to store adult and children bicycles, a
17 barbeque, a cooler, a garbage-collection container, and other items.
18 South of the driveway and parking structure is an orchard. The orchard
19 also backs the home on its westerly side. North of Mr. Vargas' home is
20 a partial cyclone fence and undeveloped land with sagebrush and other
21 native plants; near the fence was a metal burn barrel. Given the home's
22 setting and the elevation differences in the adjacent land, there are
23 no structures other than those on Mr. Vargas' property that can be
24 viewed from his front door. Other than the gravel Arousa Road which
25 runs in front of Mr. Vargas' property, there is also a mixed dirt and
26 gravel road, approximately 150 yards to the north of his property, which

1 is perpendicular to Arousa Road. This is a rural, isolated location
2 with very few vehicles using these roads.¹

3 City of Kennewick Detective Aaron Clem, who is assigned to the
4 Tri-Cities Violent Gang Task Force,² received information in September
5 2012 that Mr. Vargas was involved in drug distribution in the Tri-Cities
6 area. In April 2013, desiring to learn who Mr. Vargas was associating
7 with at his home, Detective Clem requested permission from Task Force
8 supervising agents to install a sophisticated video camera in a
9 surreptitious manner so that activities in Mr. Vargas' front yard could
10 be surveilled through electronic, remote means. Permission was granted,
11 and FBI technical agents worked with a local utility company to install
12 a hidden video camera on a telephone pole. The selected telephone pole
13 is on the other side of Arousa Road from Mr. Vargas' home and is
14 approximately 150 yards south of the home. The land on which the
15 telephone pole sits is at the crest of a hill to the south of Mr. Vargas'
16 home; therefore, the telephone pole sits at a higher elevation than Mr.

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19 ¹ The "lay of the land" can be discerned from the pictures offered at the
20 suppression hearing and attached to the briefs, ECF Nos. 49 & 60, as well as
21 the recorded video, ECF Nos. 71, 81, & 87.

22 ² The Task Force is comprised of law enforcement officers from the U.S.
23 Marshals Service, the Federal Bureau of Investigation (FBI), the Drug
24 Enforcement Agency, Benton and Franklin Counties Sheriff's Departments, and
25 each of the Tri-Cities (Richland, Kennewick, and Pasco) City Police
26 Departments.

1 Vargas' home. The video camera was installed near the top of the
2 telephone pole. The video camera began operating April 4, 2013.

3 The video camera's silent feed was wirelessly transmitted to
4 Detective Clem's computer in his office approximately twenty miles away.
5 From his computer, Detective Clem could rotate and zoom the video
6 camera's view. Detective Clem usually aimed the video camera at Mr.
7 Vargas' front yard; yet, Detective Clem could also remotely pan and zoom
8 the camera so that he could focus on anything in the front yard,
9 including the front door, items in the open parking structure, vehicles
10 (and open trunks and doors), individuals, and surrounding area. The
11 video camera operated twenty-four hours a day and its feed was saved to
12 an external hard drive connected to Detective Clem's computer.³ Although
13 Agent Clem testified that the recording was continuous for this six-
14 week period, there are segments on the hard-drive recording and the DVD
15 that "jump" in time. The Court is unsure whether these time jumps,
16 which typically range from thirty minutes to two hours, are caused by
17 a recording malfunction or whether law enforcement deleted these
18 segments from the recording.

21
22 ³ The external hard drive is ECF No. 81. Also part of the record is a DVD
23 spanning a two-hour interval on May 6, 2013, from the hard-drive recording,
24 which shows Mr. Vargas and two other men engaging in target practice in the
25 area between Mr. Vargas' home and the fence running parallel to Arousa Road.
26 ECF No. 71.

1 The video camera did not have night vision, or infrared or heat-
2 sensing capabilities. Once the feed was recorded, the recorded image
3 cannot be enlarged without distortion, but "still photographs" can be
4 taken from the video recording, some of which were used to support the
5 subsequent search warrant application, Supp. Hrg. Gov't Ex. No. 1, which
6 is discussed below. There is no evidence that the video camera was used
7 to record what was occurring inside Mr. Vargas' home; however, the
8 technical abilities of the camera would have made it possible for
9 Detective Clem to zoom inside an open front door or an unobstructed
10 window.

11 When Detective Clem's work schedule permitted, he remotely watched
12 the "live" video feed on his computer. However, often he needed to
13 watch the recorded video feed given that he did not remain at his office
14 computer twenty-four hours a day, seven days a week during the six-week
15 time period the wireless video feed was provided to his work computer.
16 While reviewing the recorded video feed from May 2, 2013, Detective Clem
17 observed Mr. Vargas walk from his backyard to the driveway area in the
18 front of his house and raise his hands while holding an object consistent
19 with a firearm. Detective Clem believed, based on Mr. Vargas' stance
20 and hand positioning, that Mr. Vargas was engaging in target practice
21 with a pistol.

22 On May 6, 2013, Detective Clem remotely observed, through the live
23 video-camera feed, Mr. Vargas arrive home and greet two males who were
24 waiting in his front yard. The three men socialized and drank in the
25 front yard under the shade of a large tree. After a while, Mr. Vargas
26 placed what appeared to be a glass beer bottle on top of a wooden fence

1 post – part of the fence that parallels Arousa Road. The men, including
2 Mr. Vargas, took turns engaging in target practice by using a firearm
3 to shoot at the bottle. Detective Clem used his computer controls to
4 zoom and pan the video camera to focus on the individuals' faces, hands,
5 and conduct during the target practice. Because of the camera's zooming
6 capabilities, Detective Clem observed what appeared to be a silver semi-
7 automatic pistol of unknown caliber. Detective Clem also observed what
8 appeared to be recoil from the pistol and smoke leaving the pistol's
9 barrel. Later Mr. Vargas retrieved a rifle from the direction of his
10 house, and the men continued to take turns engaging in target practice,
11 now with the rifle. The location is so remote that the video recorded
12 one of the men urinating at the side of the front yard near the cyclone
13 fence fifteen feet from Arousa Road, presumably confident that he would
14 not be observed.

15 The recording for May 6 later jumps from 3:56 p.m. to 4:45 p.m.;
16 as a result, there is no recorded video for approximately forty-five
17 minutes. When the recording resumes at 4:45 p.m., two other vehicles
18 and two other men are present. The men continued socializing but no
19 target practice occurred in the presence of these two recently arrived
20 men. After some time, the two recently arrived men leave in a single
21 vehicle. Because the recording does not contain the segment of time
22 when these two "new" vehicles arrive, it is unknown to the Court as to
23 whom arrived in the other "new" vehicle. However, it appears that the
24 driver of that vehicle went into the house and did not socialize with
25 Mr. Vargas and the others outside. Following the departure of these
26 two new men, target practice resumes by the three men who were initially

1 present. Later that evening, those three men, including Mr. Vargas,
2 enjoy a bonfire in the nearby burn barrel.

3 Based on his review of Mr. Vargas' prior contacts with law
4 enforcement, Detective Clem suspected that Mr. Vargas was residing
5 unlawfully in the United States. Detective Clem spoke to U.S.
6 Immigration and Customs Enforcement agents, who also believed that Mr.
7 Vargas was in the United States unlawfully. On May 14, 2013, Detective
8 Clem applied for a search warrant based on Mr. Vargas' suspected
9 violation of 18 U.S.C. § 922(g)(5): being an alien in possession of a
10 firearm. A federal magistrate judge issued a search warrant later that
11 day for evidence of crime and contraband in Mr. Vargas' home and
12 outbuildings. On May 16, 2013, the Task Force executed the search
13 warrant at approximately 6:00 a.m. During the search, four firearms
14 were found, as well as baggies containing 5 grams of a white crystal
15 substance that field tested presumptive positive for methamphetamine.

16 On the day that Detective Clem applied for the search warrant, he
17 also requested that the FBI technical agents turn off the video camera
18 feed. Detective Clem testified that he was unsure when the video camera
19 was physically removed. Yet, the recording shows on May 16, 2013, at
20 4:45 a.m. (approximately one hour before the search warrant was
21 executed) that the video camera's lens was shifted (presumably remotely)
22 so that only the sagebrush field to the east of home was in view. At
23 10:50 a.m., the video camera's lens was shifted back (presumably
24 remotely) so that Mr. Vargas' home and front yard was in its view again.
25 Law enforcement apparently finished executing the search warrant by that
26 time as law enforcement officers are not seen on Mr. Vargas' property

1 when the video camera's lens shifts back to Mr. Vargas' property. The
2 recording contains footage until approximately 8:00 a.m. on May 17,
3 2014.

4 On May 16, 2013, a criminal complaint was filed in this District
5 charging Mr. Vargas with violating 18 U.S.C. § 922(g)(5) (alien in
6 possession of a firearm) and 21 U.S.C. § 841(a)(1) (intent to distribute
7 5 grams or more of actual meth). ECF No. 1. On May 22, 2013, an
8 Indictment was filed, charging Mr. Vargas with these same crimes. ECF
9 No. 12.

10 Believing that the evidence obtained as a result of the video
11 camera's surreptitious viewing and recording of the on-goings in his
12 front yard for six weeks violated his Fourth Amendment right to be free
13 from unreasonable search, Mr. Vargas filed a motion to suppress the
14 evidence obtained as a result of the video camera. ECF No. 47. The
15 Court held an evidentiary hearing on the opposed suppression motion on
16 February 11, 2014, ECF No. 72, and permitted the Electronic Frontier
17 Foundation (EFF) to submit amicus curiae arguments, ECF Nos. 55 & 63.⁴
18 Following the hearing, the Court invited supplemental briefing. ECF
19 Nos. 76, 86, 93, & 97. The Court also requested the USAO provide
20 Defendant and the Court with technical details regarding the video
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23 ⁴ Mr. Vargas was present at the pretrial conference, represented by John
24 Matheson. Alexander Ekstrom appeared on behalf of the USAO. Hanni
25 Fakhoury and Robert Seines appeared on the EFF's behalf. The Court heard
26 testimony from Detective Aaron Clem.

1 camera and associated technology (collectively, "video camera"). The
2 USAO expressed concern regarding disclosing details about the video
3 camera, contending that such information is protected by the law-
4 enforcement privilege. As explained below, the Court determines it need
5 not learn further details of the technological capabilities of the video
6 camera, or ascertain whether the law-enforcement privilege protects such
7 information, under these circumstances.

8 **B. Analysis**

9 Law enforcement may collect information to aid its investigations,
10 but law enforcement's conduct is limited by the Fourth Amendment.
11 *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). The Fourth Amendment
12 protects "[t]he right of people to be secure in their persons, houses,
13 papers, and effects, against unreasonable searches and seizures." U.S.
14 Const. amend. IV. It is a basic principle of Fourth Amendment law that
15 searches and seizures without a warrant are presumptively unreasonable.
16 *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014); *Groh*
17 *v. Ramirez*, 540 U.S. 551, 559 (2004). How the Fourth Amendment applies
18 to protect the people's right to be free from unreasonable search and
19 seizure is a matter of continuous public and legal scrutiny, especially
20 with the evolution of new technologies and their use by law enforcement.⁵

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22 ⁵ Recent polls indicate that many Americans are concerned with the oversight
23 that presently applies to government surveillance programs. *See* Emily
24 Swanson, *Poll: NSA Oversight is Inadequate, Most Americans Say*, Huffington
25 Post, Aug. 27, 2013, available at
26 http://www.huffingtonpost.com/2013/08/17/nsa-oversight-poll_n_3769727.html;

1 Riley, 134 S. Ct. at 2484 (recognizing that flip phone and smart phones
2 are "based on technology nearly inconceivable just a few decades ago").
3 "The police, of course, are entitled to enjoy the substantial advantages
4 this technology confers. They may not, however, rely on it blindly.
5 With the benefits of more efficient law enforcement mechanisms comes

7 Frank Newport, *Americans Disapprove of Government Surveillance Programs*,
8 GALLUP Politics, June 12, 2013, available at
9 [http://www.gallup.com/poll/163043/americans-disapprove-government-](http://www.gallup.com/poll/163043/americans-disapprove-government-surveillance-programs.aspx)
10 [surveillance-programs.aspx](http://www.gallup.com/poll/163043/americans-disapprove-government-surveillance-programs.aspx). See also Adam Schwartz, *Chicago's Video*
11 *Surveillance Cameras: A Pervasive and Poorly Regulated Threat to Our Privacy*,
12 11:2 Nw. J. Tech. & Intell. Prop. 2, 47 (Jan. 2013) (discussing privacy
13 concerns with government use of cameras even in public spaces, and
14 recommending that the government notify the public as to where a camera is
15 located); The Editorial Board, *The President on Mass Surveillance*, N.Y.
16 Times, Jan. 17, 2014, available at
17 [http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-](http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html?module=Search&mabReward=relbias%3Ar%2C%5B%22RI%3A8%22%2C%22RI%3A13%22%5D)
18 [surveillance.html?module=Search&mabReward=relbias%3Ar%2C%5B%22RI%3A8%22%2C%22](http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html?module=Search&mabReward=relbias%3Ar%2C%5B%22RI%3A8%22%2C%22RI%3A13%22%5D)
19 [RI%3A13%22%5D](http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html?module=Search&mabReward=relbias%3Ar%2C%5B%22RI%3A8%22%2C%22RI%3A13%22%5D) ("The president announced important new restrictions on the
20 collection of information about ordinary Americans, including the requirement
21 of court approval before telephone records can be searched. He called for
22 greater oversight of the intelligence community and acknowledged that
23 intrusive forms of technology posed a growing threat to civil liberties.");
24 *Surveillance of Citizens by Government*, N.Y. Times, available at
25 [http://topics.nytimes.com/top/reference/timestopics/subjects/s/surveillance_o](http://topics.nytimes.com/top/reference/timestopics/subjects/s/surveillance_of_citizens_by_government/index.html)
26 [f_citizens_by_government/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/surveillance_of_citizens_by_government/index.html) (organizing commentary and archival
articles regarding surveillance of citizens by the government).

1 the burden of corresponding constitutional responsibilities." *Arizona*
2 *v. Evans*, 514 U.S. 1, 17-18 (1995) (O'Connor, J., concurring).

3 The Supreme Court's recent decisions in *United States v. Jones*,
4 132 S. Ct. 945 (2012), and *Florida v. Jardines*, 133 S. Ct. 1409 (2013),
5 discuss and clarify the Fourth Amendment analysis the Court is to employ
6 when analyzing the constitutionality of a search conducted by law
7 enforcement. To determine whether an unreasonable search occurred, a
8 court considers two Fourth-Amendment approaches: 1) whether a trespass
9 by law enforcement occurred (property-based approach), and/or 2) whether
10 an individual's reasonable expectation of privacy was violated by law
11 enforcement (reasonable-expectation-of-privacy approach). *Jones*, 132
12 S. Ct. at 951 & 953.

13 The property-based approach does not apply here. Law enforcement
14 did not physically enter Mr. Vargas' land or home until after it obtained
15 a search warrant based on the information learned from the video camera.
16 And law enforcement did not gain access to Mr. Vargas' wireless service
17 or other digital property to covertly record and transmit the activities
18 in the front yard. The video camera did "intrude" upon Mr. Vargas'
19 front yard and the vehicles contained therein by recording the incidents
20 occurring thereon or items contained therein; however, the camera itself
21 was not on Mr. Vargas' land but rather on a telephone pole on another's
22 land, to which law enforcement had obtained permission to install the
23 camera. For these reasons, a physical trespass did not occur. See
24 *Jones*, 132 S. Ct. at 953 ("Situations involving merely the transmission
25 of electronic signals without trespass . . . remain[s] subject to" a
26 reasonable-expectation-of-privacy approach.).

1 The reasonable-expectation-of-privacy approach requires the Court
2 to assess whether 1) Mr. Vargas had an actual (subjective) expectation
3 that the activities in his front yard would be private, and 2) “society
4 is prepared to recognize [his subjective expectation of privacy] as
5 reasonable.” *United States v. Lopez-Cruz*, 730 F.3d 803, 807 (9th Cir.
6 2013) (internal citations removed). Accordingly, the Court’s analysis
7 focuses on whether Mr. Vargas had a reasonable expectation of privacy
8 to not have his front yard continuously observed and recorded for six
9 weeks by a camera with zooming and panning capabilities hidden on a
10 telephone pole over a hundred yards away, and whether his subjective
11 expectation of privacy is objectively reasonable. *See id.* The Court
12 finds the answer to both of these questions is clear: society expects
13 that law enforcement’s continuous and covert video observation and
14 recording of an individual’s front yard must be judicially approved,
15 and Mr. Vargas’ conduct during the six weeks that his front yard was
16 covertly observed and recorded indicates that he expected not to have
17 his front yard covertly observed and recorded on a continuous basis by
18 law enforcement.

19 The parties’ and EFF’s arguments, concerning the subjective and
20 objective reasonable expectations of privacy, include analysis of
21 whether Mr. Vargas’ front yard is part of his home’s curtilage or an
22 “open field.” Given the invasive nature of the employed continuous
23 video surveillance, the Court rules that the Fourth Amendment analysis
24 here is not controlled by whether Mr. Vargas’ front yard is or is not
25 part of his home’s curtilage. *See Riley*, 134 S. Ct. at 2490-91
26 (assessing the pervasiveness of the intrusion on one’s privacy when

1 searching cell phones). Yet to provide a thorough analysis of all
2 issues addressed by the parties, the Court proceeds to analyze curtilage
3 and "open field" principles to the facts of this case.

4 Typically, an individual has a reasonable expectation of privacy
5 to his curtilage: the area immediately surrounding his home that
6 "harbors the intimate activity associated with the sanctity of a man's
7 home and the privacies of life." *United States v. Dunn*, 480 U.S. 294,
8 300 (1987); *see also Jardines*, 133 S. Ct. at 1414 ("At the [Fourth]
9 Amendment's 'very core' stands 'the right of a man to retreat into his
10 own home and there be free from unreasonable governmental intrusion.'" (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))). Four
11 factors assist with assessing whether an area is within the curtilage:
12 1) the area's proximity to the home, 2) whether the area is enclosed,
13 3) the uses for that area, and 4) the steps taken by the resident to
14 protect the area from observation by a passerby. *Dunn*, 480 U.S. at 301.
15 These factors do not complete the curtilage assessment but rather "are
16 useful analytical tools only to the degree that, in any given case, they
17 bear upon the centrally relevant consideration – whether the area in
18 question is so intimately tied to the home itself that it should be"
19 protected by the Fourth Amendment. *Id.*

21 While a person typically has a reasonable expectation of privacy
22 to his curtilage, an individual has no reasonable expectation of privacy
23 in an "open field," the area outside of a home's curtilage. *Oliver v.*
24 *United States*, 466 U.S. 170, 179 (1984) ("[A]n individual may not
25 legitimately demand privacy for activities conducted out of doors in
26 fields, except in the area immediately surrounding the home [the

1 curtilage]."). "An open field need be neither 'open' nor a 'field' as
2 those terms are used in common speech. For example . . . , a thickly
3 wooded area nonetheless may be an open field as that term is used in
4 construing the Fourth Amendment." *Id.* at 180, n.11.

5 After assessing each of the *Dunn* factors, the Court concludes Mr.
6 Vargas' front yard is part of his home's curtilage. First, the front
7 yard is immediately adjacent to the house. Second, the front yard is
8 fenced on the east and includes a gated driveway. Although the front
9 wire cyclone fence, which is supported by wooden and metal posts, does
10 not substantially obstruct a passerby's view, a passerby's view of the
11 front yard is hindered to some degree by the sagebrush, trees, and other
12 native plants, which are in the front yard and which line the fence.
13 Furthermore, there is a slight embankment between Arousa Road and the
14 front yard. The open parking structure provides a southern obstacle,
15 and the house provides a western barrier. As to the third *Dunn* factor,
16 Mr. Vargas and those he lived with used their front yard for "backyard
17 purposes": to barbeque, socialize with guests, and target practice. In
18 addition, the household used the front yard to park cars and the ATV,
19 store adult and children's bikes, and hold the garbage-collection
20 container and a burn barrel. The USAO argues that target practice is
21 not an intimate activity associated with the sanctity of Mr. Vargas'
22 home and the privacies of life. However, the Court must view this
23 activity in the context of the home's setting—a rural locale off a
24 gravel road—and in light that the target practice was an activity
25 engaged in by three men as they relaxed and socialized in the shade of
26 the tree in Mr. Vargas' front yard. The relaxed nature of this

1 gathering, and the expectation that it was a private activity, is
2 underscored by the fact that one of the men urinated near the cyclone
3 fence, approximately fifteen feet from Arousa Road. The Court finds
4 under these circumstances that the act of engaging in target practice
5 in the front yard is consistent with the Court recognizing the front
6 yard as part of the home's curtilage. As to the last *Dunn* factor (the
7 steps taken by the resident to protect the area from observation by a
8 passerby), Mr. Vargas selected to live in a home in a rural setting off
9 a gravel road with trees, fencing, and a gated driveway.

10 Accordingly, after considering these four factors, amongst the
11 totality of the circumstances, the Court finds Mr. Vargas' front yard
12 is part of his home's curtilage. See *Jardines*, 133 S. Ct. at 1414-15
13 (recognizing that the home's front porch was part of the curtilage even
14 though it was not enclosed or gated, and could be seen from the road).
15 Mr. Vargas' front yard was separated from the gravel Arousa Road by a
16 fence and gated driveway; Mr. Vargas also enjoyed a sense of enclosure
17 in his front yard due to the parking structure, northern fence, and the
18 natural vegetation and elevation change near the eastern fence; and Mr.
19 Vargas did not affirmatively draw the public onto his property. Cf.
20 *United States v. Duenas*, 691 F.3d 1070, 1081 (9th Cir. 2012) (finding
21 the non-enclosed front yard was not part of the curtilage as there was
22 no evidence regarding the uses for the non-enclosed front yard); *United*
23 *States v. Bausby*, 720 F.3d 652, 656 (8th Cir. 2013) (finding a chain-
24 link-fenced front yard was not part of the curtilage because the
25 defendant took affirmative steps to draw the public into his front yard
26 by displaying items for sale); *United States v. Anderson-Bagshaw*, 509

1 Fed. Appx. 396, 404-05 (6th Cir. 2012) (unpublished opinion)
2 (distinguishing between three areas outside the home, finding the
3 backyard, which was in immediate proximity to the house and was fairly
4 enclosed by trees, a fence, and a barn, and contained a picnic table
5 and clothesline, was part of the curtilage, and finding the pasture and
6 barnyard were outside of the curtilage). Accordingly, the Court finds
7 the front yard is part of the home's curtilage. However, as mentioned
8 above, the Court's finding of curtilage is not essential to the Court's
9 finding that law enforcement's constant video-camera surveillance of
10 Mr. Vargas' front yard for six weeks is an unreasonable search given
11 that Mr. Vargas reasonably expected that his private activities in his
12 front yard would not be subject to such constant, covert surveillance.⁶

13 The Court so rules while recognizing that law enforcement is not
14 barred from making "plain view" observations of a home's curtilage.
15 "The Fourth Amendment protection of the home has never been extended to
16 require law enforcement officers to shield their eyes when passing by
17 a home on public thoroughfares. Nor does the mere fact that an
18

19 ⁶ Given the reasonable expectation of privacy that Mr. Vargas possessed to
20 his front-yard activities, the question of whether he possesses a privacy
21 interest in his "personal curtilage" need not be addressed. See Andrew
22 Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 Wm. &
23 Mary L. Rev. 1283, 1345-48 (April 2014) (discussing the need for Fourth
24 Amendment jurisprudence to recognize a privacy right to one's personal
25 curtilage, especially given the pervasive use of public surveillance by video
26 cameras).

1 individual has taken measures to restrict some views of his activities
2 preclude an officer's observations from a public vantage point where he
3 has a right to be and which renders the activities clearly visible."
4 *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

5 The permitted "plain view" observations in *Ciraolo*, however, are
6 much different from law enforcement's electronic, continuous remote
7 surveillance here. In *Ciraolo*, the Supreme Court analyzed "whether
8 naked-eye observation of the curtilage[, i.e., a fully-fenced backyard,]
9 by police from an aircraft lawfully operating at an altitude of 1,000
10 feet violates an expectation of privacy that is reasonable." *Id.* at
11 213-14. The Supreme Court held no, highlighting that any member of the
12 public flying in the airspace above the defendant's home could have seen
13 the marijuana in the backyard, and therefore defendant's expectation
14 that his garden would not be observed was unreasonable and not an
15 expectation that society is prepared to honor. *Id.*

16 The same day as *Ciraolo*, the Supreme Court decided *Dow Chemical*
17 *Co. v. United States*, 476 U.S. 227 (1986). In *Dow Chemical*, the Supreme
18 Court determined "the open areas of an industrial plant complex with
19 numerous plant structures spread over an area of 2,000 acres are not
20 analogous to the 'curtilage' of a dwelling for purposes of aerial
21 surveillance; such an industrial complex is more comparable to an open
22 field and as such it is open to the view and observation of persons in
23 aircraft lawfully in the public airspace immediately above or
24 sufficiently near the area for the reach of cameras." *Id.* at 240.

25 Yet, the Supreme Court took the opportunity to note in *Dow*
26 *Chemical*, "this is *not* an area immediately adjacent to a private home,

1 where privacy expectations are most heightened." *Id.* at 237, n.3. This
2 comment by the Supreme Court in *Dow Chemical* is interesting given its
3 same-day ruling in *Ciraolo*: law enforcement's naked-eye observation of
4 marijuana in one's back yard did not constitute a Fourth Amendment
5 violation. The Supreme Court's comment in *Dow Chemical* indicates that
6 *Ciraolo* may have been decided differently if law enforcement's
7 observations included more than a one-time naked-eye observation of
8 defendant's backyard.

9 In 2011, the Ninth Circuit commented on plain-view curtilage
10 observations by law enforcement in *United States v. Perea-Rey*, 680 F.3d
11 1179 (9th Cir. 2011). In *Perea-Rey*, the Ninth Circuit determined a
12 carport within the fenced front yard and adjacent to the house was part
13 of the curtilage and therefore the officers violated the defendant's
14 Fourth Amendment right by entering the curtilage without a warrant.
15 While *Perea-Rey* involved a physical trespass by the officers, the Ninth
16 Circuit commented, "a warrant is not required to observe readily visible
17 items within the curtilage, and 'officers [need not] *shield their eyes*
18 when passing by a home on public thoroughfares." *Id.* at 1186 (emphasis
19 added). The Ninth Circuit highlighted that therefore law enforcement
20 can use what they actually saw from a public vantage point, such as a
21 sidewalk, in a warrant application. *Id.*

22 Based on this Fourth Amendment jurisprudence, there is no question
23 that, if Agent Clem had personally watched Mr. Vargas possess a firearm
24 in his front yard, when either passing by on Arousa Road, flying above
25 Mr. Vargas' property on a one-time occasion, or sitting on the telephone
26 pole with a camera and telephoto lens, Agent Clem's observation would

1 not constitute a search, and therefore, he could use such observation
2 as a basis for a search warrant. Although having an agent sit on top
3 of a telephone pole may seem far afield, it is consistent with Justice
4 Scalia's "constable" example in *Jones*, 132 S. Ct. at 950, n.3. In
5 *Jones*, Justice Scalia posits that a constable could conceal himself in
6 a suspect's coach in order to track the movements of the coach, thereby
7 serving as an 18th century global-positioning-system (gps) device.

8 Here, it may have been possible for law enforcement agents to take
9 turns personally observing Mr. Vargas' activities in his front yard for
10 a thirty-day period but the success of such hypothetical constables
11 going unnoticed by Mr. Vargas for thirty days is highly unlikely. See
12 *Nerber*, 222 F.3d at 604 (recognizing that people modify their behavior
13 when they are in the presence of others). Nevertheless, the Court is
14 limited to the facts before it, which do not include constables sitting
15 on the telephone pole. Rather Agent Clem only had the information
16 pertaining to Mr. Vargas' May 2 and 6, 2013 target practices because of
17 the live and recorded view afforded by the video camera, which was
18 covertly installed approximately thirty days prior to these events.
19 This "view" is so different in its intrusiveness that it does not qualify
20 as a plain-view observation.

21 "Hidden video surveillance is one of the most intrusive
22 investigative mechanisms available to law enforcement. The sweeping,
23 indiscriminate manner in which video surveillance can intrude upon us,
24 regardless of where we are, dictates that its use be approved only in
25 limited circumstances." *Nerber*, 222 F.3d at 600. Although law
26 enforcement is permitted to use technology to enhance investigative

1 abilities, see *Ciraolo*, 476 U.S. at 215, law enforcement's video
2 surveillance of Mr. Vargas' front yard for six weeks with a camera that
3 could zoom and record violated his reasonable expectation of privacy:
4 an expectation that society is prepared to recognize as reasonable.⁷

5 Continuous video surveillance of an individual's front yard
6 "provokes an immediate negative visceral reaction: indiscriminate video
7 surveillance raises the specter of the Orwellian state." *United States*
8 *v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (permitting thirty
9 days of video surveillance from a pole camera which recorded defendant's
10 backyard only because law enforcement had obtained a warrant to do so);
11 see also *Nerber*, 222 F.3d at 603-04 (suppressing in part evidence
12 obtained from a video camera installed in a hotel room because, although
13 the defendants did not rent the room, they had a legitimate expectation
14 of privacy when they were in the room by themselves); *United States v.*
15 *Taketa*, 923 F.2d 665, 673-74 (9th Cir. 1991) (suppressing video footage
16 of federal employees in their offices because it violated the Fourth
17 Amendment as they had a legitimate expectation of privacy not to be
18 continuously recorded by a hidden ceiling camera in their office);
19 *Shafer v. City of Boulder*, 896 F. Supp. 2d 915, 930-32 (D. Nev. 2012)
20 (finding, in the context of a 42 U.S.C. § 1983 lawsuit, that the use of
21 _____

22 ⁷ Cf. Marc Blitz, *The Fourth Amendment Future of Public Surveillance:*
23 *Remote Recording and Other Searches in Public Places*, 63 Am. U. L. Rev. 21,
24 84-86 (Oct. 2013) (recommending that Fourth Amendment analysis pertaining to
25 public surveillance focus on whether a recording was generated and reviewed
26 by law enforcement).

1 a video camera on a neighbor's property to film the plaintiff's backyard
2 for fifty-six days constituted a search as the plaintiff had a
3 reasonable expectation that his home would not be subject to unwarranted
4 government video surveillance). This dragnet law enforcement practice
5 is not akin to either a naked-eye observation or a photographic picture
6 by a live officer.⁸ See *United States v. Knotts*, 460 U.S. 276, 284

8 ⁸ The use of drones by law enforcement is another investigative practice
9 that deviates greatly from "traditional" law enforcement investigative
10 practices. Many states have adopted legislation to control the use of drones
11 because a drone's ability to constantly and covertly view and record an
12 individual or setting infringes on the American public's reasonable
13 expectation of privacy that they will not be constantly and covertly observed
14 by the government without a warrant. While seeking to protect this
15 reasonable expectation of privacy, the drone legislation permits law
16 enforcement to seek a judicial warrant to utilize a drone for investigative
17 purposes; or under limited exceptions, which are similar to the warrant
18 exceptions developed under Fourth Amendment case law, the legislation permits
19 law enforcement to use a drone for investigative purposes without a warrant
20 in order to counter a specific terrorist attack or prevent specific imminent
21 danger to life or property. See Judge C. Philip Nichols, *Drones: The Coming*
22 *of Age of a Not-So-New Technology*, 53 ABA: The Judge's Journal 4 (2014)
23 (summarizing thirteen state's enacted drone legislation); Y. Douglas Yang,
24 *Big Brother's Grown Wings: The Domestic Proliferation of Drone Surveillance*
25 *and the Law's Response*, 23 B.U. Pub. Int. L.J. 343, 365 (Summer 2014)
26 (discussing the different state's legislative response to the use of drones).
See also George Blum, Romualdo Eclavea, Alan Jacobs, and Eric Surette, 68 Am.

1 (1982) (noting "if such dragnet type law enforcement practices . . .
2 should eventually occur, there will be time enough then to determine
3 whether different constitutional principles may be applicable").
4 Electronic surveillance by the government is increasing, and the need
5 to balance this government tool with the Fourth Amendment is required.
6 See *Riley*, 134 S. Ct. at 2484-85 (assessing the degree to which the
7 search intrudes on an individual's privacy and the degree to which the
8 search is needed to promote legitimate governmental interests).

9 Here, the Fourth Amendment permits the type of electronic
10 surveillance employed only if a warrant⁹ supported by probable cause is

11 _____
12 Jur. 2d Searches and Seizures § 114 (Nov. 2014) (discussing the case-law
13 exceptions to the Fourth Amendment's warrant requirement).

14 ⁹ Not only has technology eased law enforcement's investigative abilities
15 but technology has also expedited law enforcement's ability to obtain a
16 warrant. See *Missouri v. McNeely*, 133 S. Ct. 1552, 1561-62 (2013) (observing
17 that technology now "allow[s] for the more expeditious processing of warrant
18 applications," and citing state statutes permitting warrants to be obtained
19 "remotely through various means, including telephonic or radio communication,
20 electronic communication . . . , and video conferencing")); see also Admin.

21 Office of the U.S. Courts, Table S-17: Matters Disposed of by U.S. Magistrate
22 Judges During the 12-Month Periods Ending September 30, 2004, and September
23 30, 2009 Through 2013, available at

24 <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S17S>
25 [ep13.pdf](http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S17S) (showing an 83% increase in search warrant applications between 2004
26 and 2013); Admin. Office of the U.S. Courts, Wiretap Report 2012 (2012),
available at <http://www.uscourts.gov/Statistics/WiretapReports/wiretap->

1 obtained because society recognizes Mr. Vargas' subjective expectation
2 of privacy in his front yard as a reasonable expectation of privacy.¹⁰
3 And given the setting, Mr. Vargas reasonably believed that his front-
4 yard activities would be private. Mr. Vargas chose to live in a rural
5 area: an area mixed with farmland and undeveloped, sagebrush land. His
6 rural home sits off a gravel road, and his front yard has a sense of
7 enclosed space given a gated driveway and cyclone fence separating it
8 from the gravel road. The USAO argues that any passerby could have seen
9 Mr. Vargas' conduct. However, the setting of Mr. Vargas' home does not
10 make the likelihood of a passerby likely: the road is gravel, his
11 neighbors are "country neighbors," *i.e.*, they live a distance away, and
12 there are no public sidewalks. In addition, Mr. Vargas could hear a
13 vehicle coming down the gravel road and modify his behavior, *i.e.*,
14 target practice would cease. See *Nerber*, 222 F.3d at 604 ("People feel
15 comfortable saying and doing things alone that they would not say or do

17 report-2012.aspx (comparing 3,397 wiretap applications in 2012, with 1,359
18 wiretap applications in 2002; with approximately 99% of the wiretap
19 applications being granted in those years).

20 ¹⁰ A warrantless video search and recording by law enforcement for a limited
21 period of time based merely on reasonable suspicion may be consistent with
22 *Terry v. Ohio*, 392 U.S. 1 (1968). Yet, here, law enforcement's continued use
23 of the covert video recording clearly exceeded *Terry*: a warrant was required.
24 This also is not a case involving officer safety or the use of a recording
25 device activated by a law enforcement officer during a *specific* encounter at
26 which the officer was present.

1 in the presence of others."). In fact, the recording shows that Mr.
2 Vargas ceased target practice in the presence of the two new
3 individuals. Even if Mr. Vargas could not expect total privacy in his
4 rural front yard, "this diminished privacy interest does not eliminate
5 society's expectation to be protected from the severe intrusion of
6 having the government monitor private activities through hidden video
7 cameras." *Id.*

8 The circumstances before the Court are different in kind from the
9 circumstances in the cases cited by the USAO: *United States v. Jackson*,
10 213 F.3d 1269 (10th Cir. 2000), *vacated on other grounds, Jackson v.*
11 *United States*, 531 U.S. 1033 (2000); and *United States v. Vankesteren*,
12 553 F.3d 286 (4th Cir. 2009). In *Jackson*, the Tenth Circuit upheld law
13 enforcement's use of video surveillance from a pole camera to record
14 the front of the defendant's home in Elk City, Oklahoma. The defendant's
15 home in *Jackson* was on a public street, and there was no meaningful
16 analysis as to the impact of the *prolonged* nature of the video
17 surveillance. 213 F.3d at 1280-81. In *Vankesteren*, the Fourth Circuit
18 permitted the warrantless use of video surveillance from a pole camera
19 to "view" defendant's bird-trapping conduct on fields which were located
20 more than a mile from his home. 553 F.3d at 287-88 (4th Cir. 2009).
21 And fairly recently, an Arizona District Court found that law
22 enforcement did not conduct a search by obtaining permission of a
23 neighboring business to install a video camera to continuously record
24 the happenings in the adjacent apartment complex's fenced parking lot
25 because a passerby could observe the happenings if he was in either the
26

1 parking lot or outside the complex through the iron fence's openings.
2 *United States v. Brooks*, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012).

3 The facts involved in these three cases are different from those
4 before the Court. Here, the video camera recorded the activities in
5 Mr. Vargas' partially fenced, rural front yard for six weeks: this is
6 not a public or urban setting.¹¹ See *Oliver*, 466 U.S. at 178 ("[A]n
7 individual may . . . legitimately demand privacy for activities
8 conducted . . . in the area immediately surrounding the home."). Mr.
9 Vargas had a "'constitutionally protected reasonable expectation of
10 privacy'" to not have his front yard continuously recorded by a
11 surreptitiously placed video camera on a distant telephone pole that
12 could zoom to view the activities occurring in his front yard for six
13

14
15 ¹¹ Video cameras are commonly used by law enforcement in public places. See
16 also *Opinion, Terrorism Forces Us to Rethink Use of Surveillance*, The
17 *Olympian*, May 9, 2013, available at
18 [http://www.theolympian.com/2013/05/09/2538441/terrorism-forces-us-to-](http://www.theolympian.com/2013/05/09/2538441/terrorism-forces-us-to-rethink.html)
19 [rethink.html](http://www.theolympian.com/2013/05/09/2538441/terrorism-forces-us-to-rethink.html) (discussing polling results showing approximately 80 percent of
20 respondents favor surveillance by camera of public places); Jerry Ratcliffe,
21 *Center for Problem-Oriented Policing, Video Surveillance of Public Places*
22 *(2006)*, available at http://www.popcenter.org/responses/video_surveillance;
23 Andrea Noble, *Public Surveillance from Private Property Questioned*, The
24 *Washington Times*, Feb. 5, 2012 (discussing the use of video cameras by a
25 private neighborhood association in order to deter crime by taping public
26 spaces such as streets and sidewalks). Mr. Vargas' front yard is not a
public place.

1 weeks. *Ciraolo*, 476 U.S. at 211 (quoting *Katz v. United States*, 389
2 U.S. 347, 360 (1967) (Harlan, J., concurring)). Absent Mr. Vargas' May
3 2 and 6, 2013 target practice, how long the video camera would have
4 remained operational is unknowable. The reasonableness of the
5 expectation that one would not be observed and recorded in Mr. Vargas'
6 front yard by a covert video camera is underscored by law enforcement's
7 decision to shift the view of the camera during the execution of the
8 search warrant.

9 Because the invasive and continuous manner in which the video
10 camera was used for six weeks to surreptitiously record Mr. Vargas'
11 front yard clearly violates Mr. Vargas' Fourth Amendment right to be
12 free from unreasonable search, whether the video camera is or is not
13 "in general public use" is immaterial to the Court's Fourth Amendment
14 analysis. *Cf. Kyllo v. United States*, 533 U.S. 27, 34 (2001) (obtaining
15 information regarding conduct inside a home through the use of
16 technology that is not in general public use is a search); *Dow Chem.*
17 *Co. v. United States*, 476 U.S. 227, 238 (1986) (recognizing that
18 "surveillance of private property by using highly sophisticated
19 surveillance equipment not generally available to the public, such as
20 satellite technology, might be constitutionally proscribed absent a
21 warrant"). Further, given the continued advancement of technology and
22 reduction of cost in "old technology," the "in general public use"
23 doctrine may lose viability: but this is a question for a different day.
24 Colin Shaff, *Is the Court Allergic to Katz? Problems Posed by New Methods*
25 *of Electronic Surveillance to the "Reasonable-Expectation-of-Privacy"*
26 *Test*, 23 S. Cal. Interdisc. L.J. 409, 448 (Winter 2014) (questioning

1 the *Katz* test and suggesting that "although new surveillance
2 technologies may be superficially similar to preceding technologies,
3 modern technology can produce a detailed and broad picture of an
4 individual, entailing a very different violation of privacy than did
5 the earlier technology").

6 In summary, the severe governmental intrusion into Mr. Vargas'
7 privacy was an unreasonable search.¹² See *Nerber*, 222 F.3d at 600
8 (encouraging courts to consider the severity of the governmental
9 intrusion when assessing whether an individual has a reasonable
10 expectation of privacy). Because a warrant was not obtained to install
11 and operate the video camera, and the USAO has not proffered any
12 exception to the warrant requirement, the evidence obtained from the
13 video surveillance is suppressed as the Fourth Amendment "requires
14 adherence to judicial processes and . . . searches conducted outside
15 the judicial process, without prior approval by judge or magistrate,
16 are per se unreasonable under the Fourth Amendment – subject only to a
17 few specifically established and well-delineated exceptions." *Katz*,
18 389 U.S. at 357 (internal citations and quotations omitted); see also
19 *Riley*, 134 S. Ct. at 2482 ("Such a warrant ensures that the inferences
20 to support a search are 'drawn by a neutral and detached magistrate
21

22 ¹² A search warrant obtained for silent video surveillance must comply with
23 the standards set forth in *United States v. Koyomejian*. 970 F.2d 536, 542
24 (9th Cir. 1992) (adopting four requirements, in addition to the probable-
25 cause requirement, that a warrant seeking permission to conduct silent video
26 surveillance must meet). See also Fed. R. Crim. P. 41(b).

1 instead of being judged by the officer engaged in the often competitive
 2 enterprise of ferreting out crime.'" (internal citation removed));
 3 *Payton v. New York*, 445 U.S. 573, 585 (1979) ("Unreasonable searches or
 4 seizures conducted without any warrant at all are condemned by the plain
 5 language of the" Fourth Amendment.). In addition, because the search
 6 warrant subsequently obtained on May 14, 2013, to search Mr. Vargas'
 7 home and property was based on the information obtained from the video
 8 surveillance, the evidence discovered pursuant to the execution of the
 9 search warrant is suppressed.¹³ See *Wong Sun v. United States*, 371 U.S.
 10 471, 487-88 (1963) ("fruit of the poisonous tree").

11 C. Conclusion

12 For the above-given reasons, **IT IS HEREBY ORDERED:** Defendant's
 13 Motion to Suppress Evidence from Continuous Video Surveillance Pole Cam,
 14 **ECF No. 47**, is **GRANTED**.

15 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
 16 Order and provide copies to counsel and the U.S. Probation Office.

17 **DATED** this 15th day of December 2014.

18
 19 s/Edward F. Shea
 20 EDWARD F. SHEA
 21 Senior United States District Judge

22
 23 ¹³ Because the evidence obtained from the use of the video camera is
 24 suppressed, the Court does not analyze whether the USAO has a duty under
 25 Federal Rule of Criminal Procedure 16(a)(1)(E)(i) and *Brady v. Maryland*, 373
 26 U.S. 83 (1963), to disclose the technical details of the video camera.